85-819

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, Local 550, TWU, AFL-CIO, et al.

Petitioners,

vs.

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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76 pp

QUESTIONS PRESENTED

1. After reversing the district court's decision that certain terms of its own class action settlement agreement were clear and unambiguous, did the court of appeals violate this Court's ruling in Anderson v. City of Bessemer by reviewing incomplete extrinsic evidence in the record de novo and then deciding previously undecided issues of fact with finality?

2. After the district court had reviewed and approved a class action settlement agreement pursuant to Fed.R.Civ.P. 23(e) and ordered specific performance based upon its interpretation of that agreement, did the court of appeals err by ignoring the district court's interpretation and substituting its own interpretation based upon extrinsic evidence not considered by the district court?

3. After reversing the district court's grant of specific performance, did

the court of appeals err by not remanding but rather proceeding to adjudicate the petitioners' alternative motion on the merits -- even though the district court had never considered this motion and even though the court of appeals' decision required a determination of numerous disputed issues of fact on an incomplete evidentiary record?

THE PARTIES

The petitioners represent those members of a certified class of stewardesses who had been terminated from their employment with the respondent because they had become pregnant and given birth to a child. Petitioners were subsequently rehired by the respondent pursuant to a written settlement agreement previously entered in this cause and approved by the district court pursuant to Fed.R.Civ.P. 23(e). The certified class representative is Darlene Burmeister (formerly Darlene Preston). The respondent is American Airlines, Inc.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review its judgment and opinion entered in this case on June 7, 1985.

OPINIONS BELOW

The opinion of the court of appeals is reported at 763 F.2d 875 (7th Cir. 1985) and is reproduced in the appendix hereto, at pages 1a-23a. The order of the court of appeals denying rehearing is unreported, but is reproduced in the appendix hereto, at page 29a. The district court's opinion is unreported, but is reproduced in the appendix hereto, at pages 24a-28a.

JURISDICTIONAL STATEMENT

The court of appeals entered its opinion in this case on June 7, 1985. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on August 15, 1985. This Court has jurisdiction to review the decision of the court of appeals by writ of certiorari under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Fed.R.Civ.P. 23(e):

> "**Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs."

STATEMENT OF THE CASE

Genesis of the Litigation

In 1970, the Airline Stewards and Stewardesses Association, Local 550 ("ALSSA") commenced this action by filing a Complaint against the respondent, American Airlines, Inc. ("American") in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 70 C 2069. The Complaint alleged that American's employment policy of terminating the employment of stewardesses who became pregnant and gave birth to a child (the "Injured Class") violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e)-2) (the "1970

case"). The jurisdiction of the district court was based on 28 U.S.C. §1331.

On March 17, 1972, the late Judge Sam Perry, over the objection of several members of the Injured Class, approved a settlement agreement between ALSSA and American in the 1970 case (the "1972 Agreement"). The 1972 Agreement provided for the re-hiring of members of the Injured Class but did not provide for either back-pay or full retroactive credit for length of service or seniority. In 1973, the Court of Appeals for the Seventh Circuit reversed Judge Perry's approval of the 1972 Agreement on the ground that ALSSA was not an adequate representative of the Injured Class.*

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* Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc., 490 F.2d 636, 640-642 (7th Cir. 1973) cert. denied sub nom. Air Line Stewards and Stewardesses Association, Local 550 v. Zipes, 416 U.S. 993 (1974).

In 1972, plaintiff, Darlene Preston (now Darlene Burmeister), a member of the Injured Class in the 1970 case, commenced a class action suit against American on substantially the same grounds as the 1970 case (the "1972 case"). In 1974, Darlene Burmeister also commenced a class action suit against ALSSA alleging that it had violated Title VII of the Civil Rights Act of 1964 ("the Civil Rights Act") by actively participating in American's discrimination against the Injured Class (the "1974 case").

On October 16, 1974, the district court certified Darlene Burmeister as an adequate class representative for a class consisting of all American stewardesses whose employment had been terminated between 1965 and 1970 because of their becoming pregnant and having children (the "Certified Class").

The Entry of Summary Judgment Against American

On November 18, 1974, the 1970, 1972 and 1974 cases were consolidated. On April 28, 1976, the district court, through the Honorable Judge Frank McGarr, entered summary judgment in this consolidated action against American on the issue of liability, holding that American's employment policy violated the Civil Rights Act.

The 1977 Settlement Agreement

Pending American's appeal of the district court's grant of summary judgment against it, on August 3, 1977, the parties entered into a written Settlement Agreement (the "1977 Agreement"). Under the 1977 Agreement, American agreed, inter alia, to re-employ all members of the Certified Class who applied for re-employment. In Section V(A) of the 1977 Agreement, the parties specifically agreed that:

> "Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period."*

Notice of the 1977 Agreement (the "Notice") was approved by the district court and mailed to all members of the Certified Class pursuant to Fed.R.Civ.P. 23(e). The stated purpose of the Notice was to inform members of the Certified Class of the terms of the 1977 Agreement and that on October 3, 1977, a hearing would be held to determine whether the 1977 Agreement should be approved. In paragraph 2 of the Notice, the parties described the 1977 Agreement as follows:

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* "Compensation period" is defined in Section I of the 1977 Agreement as "the period of time which commenced upon the termination of a class member's employment and ends on the date on which an order is entered approving this settlement."

> "Each re-employed class member will be restored to full seniority and credit for length of service, including such seniority and credit for the time since her employment was terminated ... The seniority thus computed will apply for all purposes ..."

On October 3, 1977, the district court, again through Judge McGarr, conducted a hearing on the fairness of the 1977 Agreement. On October 4, 1977, Judge McGarr issued an order approving the 1977 Agreement and dismissing the consolidated action. At least 120 members of the Certified Class, including Darlene Burmeister (hereinafter collectively referred to as the "Returning Mothers"), were later re-employed by American under the terms and conditions of the 1977 Agreement.

The Returning Mothers Were Denied Benefits Under American's Retirement Plan

At all times since their re-employment, it is undisputed that, for purposes for calculating their qualifications and benefits

under American's Retirement Benefit Plan (the "Retirement Plan"), American has refused to grant the Returning Mothers "credited service"* for their length of service with American prior to the date on which their employment was illegally terminated and during the compensation period.

The Returning Mothers' Motion In The District Court

On December 28, 1982, the Returning Mothers filed in the district court their "Motion to Order Specific Performance of Settlement Agreement, or in the Alternative, to Vacate Order Dismissing Cases" (the "Motion"). The Motion requested the district court: (1) to grant the Returning Mothers retroactive credit for their length of service with American for purposes of

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* "Credited service" is the operative term used in the Retirement Plan and is defined essentially as the total length of employment with American for which each participating employee receives corresponding retirement benefits.

qualifying, vesting and calculating their benefits under the Retirement Plan as provided in the 1977 Agreement; or, in the alternative, (2) to vacate the Order dismissing the consolidated action because, in violation of the due process clause and Fed.R.Civ.P. 23(e), the Notice mislead the Returning Mothers as to the actual benefits they were to receive under the 1977 Agreement.

American answered the Motion by filing its "Response to Preston Motion for Specific Performance" in which American admitted all the material factual allegations of the Motion. American simply denied that the 1977 Agreement included retroactive credited service under the Retirement Plan. Thereafter, no discovery was conducted and no evidentiary hearing was held. Rather, the Motion was briefed by the parties, each party primarily contending that the 1977

Agreement was clear and unambiguous on its face and supported its respective position.

The District Court's Order Of May 20

On May 20, 1983, the district court, through Judge McGarr, issued a written Memorandum Opinion and Order (the "May 20 Order"). The May 20 Order granted the Motion to the extent it requested specific performance. The district court did not pass upon the alternative motion to vacate and therefore it did not adjudicate any of the factual or legal issues raised therein.

In granting specific performance, the district court ordered American to provide the Returning Mothers with full retroactive credit for length of service for purposes of qualifying, vesting and calculating their benefits under the Retirement Plan. The district court predicated its decision primarily on its conclusion that the 1977 Agreement was clear and unambiguous and

expressly included the retirement benefits at issue (App., p. 26a). Because the district court ruled that the terms of the 1977 Agreement were clear and unambiguous, it did not review any extrinsic evidence of record or enter any findings of fact.

The Decision Of The Court Of Appeals

On June 7, 1985, the Court of Appeals for the Seventh Circuit reversed the May 20 Order (the "June 7 Decision"). In the June 7 Decision, the court of appeals first held that the district court erred in finding that the 1977 Agreement was clear and unambiguous with respect to retirement benefits (App., p. 6a). In so holding, the court of appeals paid no deference whatsoever to Judge McGarr's interpretation of the 1977 Agreement. Rather, the court of appeals ignored Judge McGarr's interpretation and held that the 1977 Agreement was ambiguous and that an examination of extrinsic evi-

dence was necessary to ascertain its true meaning (Id.).

Instead of stopping there and remanding the case to the district court for an evidentiary hearing, the court of appeals then embarked on its own detailed and elaborate examination of the incomplete extrinsic evidence in the record. It did so de novo and made numerous factual findings to support its conclusion that the provision in the 1977 Agreement for "credited with ... length of service" did not include retroactive "credited service" under the Retirement Plan (App., pp. 6a-21a). The court of appeals also examined the same incomplete extrinsic evidence de novo and again made numerous factual findings to support its conclusion that the Returning Mothers' alternative motion to vacate, a motion never considered by the district court, should be denied on its factual merits (App., pp. 21a-22a).

Accordingly, the court of appeals not only reversed the May 20 Order but it also remanded the cause to the district court with a direction essentially to enter judgment on behalf of American.*

ARGUMENT

I. This Court Should Review The Decision Of The Court Of Appeals Because It Improperly Decided Issues Of Fact De Novo And On The Basis Of An Incomplete Evidentiary Record.

The court of appeals held that the district court erred in finding that the disputed language in the 1977 Agreement was clear and unambiguous (App., p. 6a). Instead of stopping there and remanding the case to the district court for an evidentiary hearing, the court of appeals proceeded to make its own factual determinations de novo and concluded that the 1977

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*Specifically, the Court of Appeals reversed and remanded with directions to the district court to deny the motion for specific performance and to deny the alternative motion to vacate (App., p. 23a).

Agreement did not entitle the Returning Mothers to receive retroactive credited service under the Retirement Plan. The June 7 Decision should be reviewed by this Court because: (a) it is in direct conflict with applicable decisions of this Court; and (b) it represents such a dramatic departure from the accepted and usual course of judicial proceedings that the exercise of this Court's power of supervision is mandated.

A. The Court Of Appeals' Decision Is In Direct Conflict With The Recent Decision Of This Court In Anderson v. City Of Bessemer.

This Court recently defined the limited scope of an appellate court's power of review in Anderson v. City of Bessemer, __ U.S. __, 105 S.Ct. 1504 (1985). In reviewing the extrinsic evidence of record de novo, the court of appeals completely disregarded this Court's decision in Anderson.

In Anderson, after a bench trial, the district court had found that the plaintiff

Anderson had been denied a job by the defendant City on account of her sex. The Court of Appeals for the Fourth Circuit reversed. It did so primarily on the basis of its own review of the evidence and its own factual determinations based on that review. This Court held that this type of review by the court of appeals was improper and reversed.

The lynchpin of this Court's decision was its finding that the Fourth Circuit improperly exceeded its power in conducting its independent review of the evidence of record. In language directly applicable here, this Court stated as follows:

> "'[A]ppellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969)." 105 S.Ct. at 1512.

In the June 7 Decision, the court of appeals recognized the decision in Anderson,

but attempted to skirt its holding by ineffectively attempting to distinguish the instant case (App., p. 7a, n. 5). The court of appeals stated that this Court's admonition in Anderson was not applicable here because the district court in the instant case never made any findings of fact. As a result, the court of appeals improperly concluded that it was free to conduct its own review of the evidence de novo and, based on that review, make its own findings of fact.

The purported distinction between the Anderson case and the instant case is really no distinction at all or, in any event, is a distinction without any substantive difference. If the June 7 Decision is permitted to stand, it will effectively turn this Court's prior decision in Anderson literally on its head, and seriously undermine the future role of the trial judge as the trier of fact.

The rationale underlying this Court's holding in Anderson was cogently enunciated for the Court by Justice White who stated:

> "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." 105 S.Ct. at 1512.

Accordingly, the main thrust of this Court's decision in Anderson was that even where a court of appeals appears to be in as good a position as the district court to make factual determinations, it should still refrain from doing so. Plainly, the experience and expertise which lies in the district court is not to be usurped.

Indeed, the result reached in Anderson is even more compelling here -- where the court of appeals did not, as in Anderson, simply disagree with the trial judge's findings, but pre-empted the trial judge's function by entering its own findings and thereby precluding the trial judge from ever

making any findings of fact. In the process, the June 7 Decision has stripped the district court of its primary function in direct contravention of this Court's decision in Anderson.

B. This Court Should Exercise Its Supervisory Power Here Because The Court of Appeals Has Dramatically Departed From The Accepted And Usual Course Of Judicial Proceedings.

No principle of appellate review is more firmly established than the principle that an appellate court will not examine evidence in the record de novo. As noted above, this principle was recently reaffirmed by this Court in Anderson v. City of Bessemer.* The June 7 Decision directly

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* Indeed, the Court of Appeals for the Seventh Circuit had, previous to its decision in this case, also consistently adhered to this legal maxim. E.g., Continental Group, Inc. v. Lincoln Land Moving and Storage, Inc., 710 F.2d 368, 373 (7th Cir. 1983); Wyant v. J. I. Case Company, Inc., 633 F.2d 1254, 1256 (7th Cir. 1980); Barnes v. St. Catherine's Hospital, 563 F.2d 324, 329 (7th Cir. 1977); Denofre v. Transportation Insurance Rating Bureau, 532 F.2d 43 (7th Cir. 1976); Leonteos v. Haase, 410 F.2d 633, 637 (7th Cir. 1969).

contravened this Court's holding in Anderson, and in the process, so radically departed from the accepted and usual course of appellate procedure that this Court should exercise its supervisory power to correct the untold damage caused thereby.

After concluding that the 1977 Agreement was ambiguous and that an interpretation of the provisions at issue involved questions of fact, the court of appeals should have remanded the cause to the district court with instructions to conduct an evidentiary hearing and enter findings of fact. But the court of appeals refused to do so and proceeded to violate the mandate of Anderson by conducting its own de novo review of the facts of record and by reaching its own conclusion as to what the parties intended in the 1977 Agreement.

Moreover, the court of appeals significantly compounded these errors by making its

de novo review of the evidence on the basis of a totally incomplete evidentiary record. Because the parties had each maintained in the district court that the meaning of the language at issue was clear and unambiguous, neither party initiated discovery; no testimony was adduced; and no documents were produced. In addition, at no time did either party represent or in any manner indicate to the district court, or to the court of appeals, that the limited evidence in the record (i.e., certain limited documents and affidavits attached to the pleadings) constituted all the relevant extrinsic evidence necessary for deciding the factual issues present in the Motion. Nevertheless, the court of appeals made the wholly unwarranted assumption, without any support in the record whatsoever, that "the parties ... have submitted to us all the extrinsic evidence that they have" (App., p. 6a) (emphasis added).

The June 7 Decision, if allowed to stand, precludes the Returning Mothers from adducing additional evidence probative of the intention of the parties and dissecting what the court of appeals has now found to be ambiguous language in §V(A) of the 1977 Agreement. We submit that a wealth of extrinsic evidence potentially exists relevant to the issue (now raised by the court of appeals) as to what the parties intended by the insertion of the disputed language in §V(A) of the 1977 Agreement. Indeed, the court of appeals itself conceded this fact when it stated that:

> "In principle, we could consider other forms of extrinsic evidence as well, but we have found nothing useful in the record." (App., p. 8a, n. 7).

Finally, the process employed by the court of appeals in reviewing the extrinsic evidence of record was, by necessity, imprecise and conjectural. For example, many of

the factual determinations which it made were predicated upon voids in the evidentiary record -- each one of which was construed against the Returning Mothers. As an illustration, the exact import of the term "credited with ... length of service" in §V(A) was the key issue to be decided. Yet, the court of appeals could not, based on the limited evidence of record before it, differentiate between the term "length of service" and the terms "company seniority" and "occupational seniority" as those terms appear in §V of the 1977 Agreement (App., pp. 11a-13a). Further, since the court of appeals was unable to ascribe any definitive meaning to the term "length of service," it openly admitted "we are puzzled as to its significance" (App., p. 13a). Since the meaning of this term was the central issue in American's appeal, it should not have been decided out of such confusion, bafflement or "puzzlement."

The court of appeals also conceded that while the parties must have "intended for that credit [for length of service] to have beneficial consequences of some sort for the re-employed class members," the term "appears to be an idle wheel" (Id.). Nonetheless, despite its admitted perplexity over what the parties intended by the use of this term, the court of appeals proceeded to conclude definitively and with finality that the term did not include "credited service" within the meaning of American's Retirement Plan.

The court of appeals' analysis of the limited evidence of record brings into sharp focus the impropriety of its de novo review of the incomplete record before it. The Returning Mothers never had an opportunity to conduct discovery or to present evidence at a hearing. Plainly, if discovery were permitted and an evidentiary hearing conducted,

these crucial issues could be fully and fairly explored and a logical and well-reasoned interpretation of them could be made. As it stands now, in its rush to finality, the court of appeals improperly construed any doubt as to the meaning and significance of the disputed language in the 1977 Agreement against the Returning Mothers.

To summarize, the court of appeals not only made factual findings de novo in direct contravention of the mandate of this Court, but it also made these findings on the basis of an incomplete and entirely undeveloped evidentiary record. This is simply too slender a reed to support a conclusion that deprives many women of significant employment benefits.* Under these circumstances,

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* American estimated that it would presently cost approximately $850,000 to fund the retirement benefits actuarially attributable to the credits for length of service sought by the Returning Mothers (App., p. 18). Thus, although it cannot be stated with exact certainty, at issue here are millions of dollars in future pension benefits.

it is imperative that this Court grant review of the decision of the Court of Appeals.

II. In Order To Insure The Finality Of Class Action Settlements, This Court Should Review This Case And Establish The Appropriate Standard Of Review Which Courts Of Appeal Should Apply In Reviewing A District Court's Interpretation Of Its Own Class Action Settlement.

Judge McGarr had initially approved the 1977 Agreement pursuant to Fed.R.Civ.P. 23(e). In reversing Judge McGarr's May 20 Order, the court of appeals applied a de novo standard of review (App., p. 4a) and rejected outright Judge McGarr's interpretation of the 1977 Agreement. In the process, the court of appeals accorded no weight whatsoever to Judge McGarr's interpretation -- even though he had reviewed the 1977 Agreement and had supervised its approval and implementation.

Given the fact that federal dockets are crowded with numerous class actions and

given the strong public and judicial policy of encouraging settlements of such suits, it is crucial that the finality of class action settlements be established by this Court through its definition of the proper standard governing courts of appeal in their review of a district court's interpretation of its own class action settlement.

Lest it be forgotten, it was Judge McGarr who, as he was required to do under Fed.R.Civ.P. 23(e), reviewed, assessed and approved the terms of the 1977 Agreement. Accordingly, who, other than Judge McGarr, was and is better qualified to ascertain the true meaning of the 1977 Agreement? We suggest no one. Now that an interpretation of certain of the terms in the 1977 Agreement are at issue, the court of appeals should, at the bare minimum, have given substantial deference to Judge McGarr's interpretation of those disputed terms. To hold otherwise,

as the court of appeals plainly did here, seriously undermines and trivializes the approval process outlined by Fed.R.Civ.P. 23(e).

Moreover, the interests of judicial economy are not well served by the June 7 Decision. For, the court of appeals has effectively undermined the future finality of class action settlements and, in the process, encouraged dissident class members and other objectors (like American) to appeal from court approved class action settlements.

Therefore, this Court should review the decision of the court of appeals and establish once and for all the proper standard which governs the review by courts of appeal of class action settlements approved under Fed.R.Civ.P. 23(e).

III. This Court Should Review The Decision Of The Court Of Appeals Because It Improperly Adjudicated The Returning Mothers' Alternative Motion To Vacate.

The court of appeals not only reversed the district court's order of specific performance, it also proceeded to adjudicate the Returning Mothers' alternative motion to vacate. The court of appeals did so notwithstanding the following: (a) the district court had not even considered the alternative motion to vacate; and (b) adjudication of the alternative motion to vacate, by necessity, required a determination of certain issues of fact.

Review should be granted in this case because: (a) the decision of the court of appeals is in direct conflict with applicable decisions of this Court; (b) the decision is in conflict with a decision of another court of appeals on the very same issue; and (c) the court of appeals has so

far departed from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision.

A. The Court Of Appeals' Adjudication Of The Returning Mothers' Alternative Motion To Vacate On The Merits Conflicts With Several Decisions Of This Court.

In Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970) and Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 468 (1947), this Court squarely held that a court of appeals should not consider for review issues not reached by the lower court. The court of appeals in the instant case completely disregarded these decisions by adjudicating the Returning Mothers' alternative motion to vacate on the merits.

As noted above, the district court granted the Returning Mothers' motion for specific performance and never reached the factual and legal issues raised in their

alternative motion to vacate. The court of appeals reversed the order of specific performance. However, instead of stopping there and remanding the case to the district court for an evidentiary hearing and the entry of findings of fact on the alternative motion to vacate, the court of appeals proceeded to adjudicate the merits of that motion. The court of appeals' action in this regard was in flagrant contravention of the mandate of this Court in Dandridge and Flowers.

B. The Court Of Appeals' Adjudication Of The Returning Mothers' Alternative Motion To Vacate On The Merits Directly Conflicts With A Decision Of The Court Of Appeals For The Second Circuit On The Very Same Issue.

In Securities Investor Protection Corp. v. Morgan, Kennedy & Co., Inc., 533 F.2d 1314 (2d Cir. 1976), the Court of Appeals for the Second Circuit refused to consider on appeal an issue which had not been fully

adjudicated by the lower court. In language directly on point here, the Court there held as follows:

> "The Supreme Court has cautioned against the consideration, on review, of issues not reached by the lower court and not adequately presented in the reviewing tribunal. Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970) [parallel citations omitted]; Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 468 (1947) [parallel citations omitted]. Where, as here, there may be a need for findings of fact before a decision can be rendered, that caution takes on an added dimension." 533 F.2d at 1322. (Emphasis added).

Here, the court of appeals' decision to deny the motion to vacate was predicated upon its factual determinations that: (1) members of the Certified Class were not mislead by the Notice advising them of the terms and conditions of the 1977 Agreement; and (2) no class member other than the class representative would have objected to the 1977 Agreement if that Notice had stated that retirement benefits were specifically

excluded (App., pp. 21a-22a). Clearly, if the court of appeals had followed the decision in Morgan, Kennedy, it would not have adjudicated the Returning Mothers' alternative motion to vacate.

Obviously, the Court of Appeals for the Seventh Circuit and the Court of Appeals for the Second Circuit are in direct conflict on this important issue.

C. This Court Should Exercise Its Supervisory Power Here Because The Court Of Appeals Has Significantly Departed From The Accepted And Usual Course Of Judicial Proceedings.

Finally, the decision of the court of appeals represents a radical departure from the accepted and usual course of judicial proceedings. As noted above, this Court has repeatedly held that issues not decided by the lower court should not be considered by the reviewing tribunal and appellate courts should not make factual determinations de novo. Nevertheless, in adjudicating the

alternative motion to vacate, the court of appeals violated both of these fundamental principles.

In addition, the court of appeals decided these factual issues in an evidentiary vacuum. The Returning Mothers never had an opportunity to present evidence that they were mislead by the Notice and Darlene Burmeister, the representative of the Certified Class, never had a chance to explain fully the circumstances surrounding the negotiation, execution and interpretation of the 1977 Agreement. Accordingly, unless this Court grants review in this case, the Returning Mothers will not only have been deprived of substantial retirement benefits, they will have lost them without any evidentiary hearing or any effective right of review. Such a result is unfair, inequitable, and a violation of the Returning Mothers' right to due process.

This is a particularly egregious result since the only basis for the refusal of the court of appeals to remand the case for a determination on its merits was its stated desire to "put the question of retroactive retirement credits under the settlement agreement finally to rest" (App., p. 22a, n. 24). Yet, if the June 7 Decision is allowed to stand, the Returning Mothers will be forever foreclosed from a full and fair hearing on their right to receive employment benefits worth millions of dollars. The concern of the court of appeals for judicial economy, while commendable, cannot justify the resultant deprivation to the Returning Mothers of valuable property rights without any form of hearing.

CONCLUSION

For the reasons stated above, petitioners respectfully request that this Court either: 1) issue a writ of certiorari to the

United States Court of Appeals for the Seventh Circuit to review its decision in this case; or 2) enter a summary reversal and remand to the court of appeals with directions that the case be remanded to the district court with instructions to permit discovery, to conduct an evidentiary hearing and to enter findings of fact with respect to the issues raised in the motion for specific performance and in the alternative motion to vacate.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1073

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,

Plaintiffs-Appellees,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 2069—Frank J. McGarr, *Chief Judge.*

ARGUED OCTOBER 5, 1984—DECIDED JUNE 7, 1985

Before CUMMINGS, *Chief Judge,* and WOOD and ESCHBACH, *Circuit Judges.*

ESCHBACH, *Circuit Judge.* American Airlines appeals an order of the district court directing it to give retroactive retirement credit to all flight attendants who have returned to work in accordance with the provisions of a 1977 settlement agreement, and who desire to participate in its retirement plan. The district court held that the settlement agreement requires American Airlines to give such retroactive retirement credit. We must decide whether the district court's interpretation of the settlement agreement is correct. We reverse.

I

Until October 1970 it was the practice of defendant/appellant American Airlines, Inc. ("American") to

terminate flight attendants who became pregnant. In 1972 plaintiff/appellee Darlene Burmeister (then Preston), one of the flight attendants terminated, commenced a class action against American, charging that the practice violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[1] In 1976 the district court entered summary judgment against American on the issue of liability. On August 3, 1977, while American's appeal was pending, the parties entered into a written settlement agreement (the "Settlement Agreement"), which provided in essence that (1) a pro rata share of the remainder of $2,700,000, after court awards for litigation expenses, costs, and attorneys' fees were deducted, would be paid to each class member; (2) American would re-employ all class members who applied and met various requirements; and (3) all returning class members would receive the amount of company and occupational seniority and credit for length of service that they would have received if American had not terminated their employment. The district court approved the settlement in October 1977 and dismissed the class action.

On January 3, 1983, Burmeister filed a motion in the district court seeking specific performance of the Settlement Agreement. In particular, she asked the district court to direct American to provide retroactive retirement credits to class members re-employed under the Settlement Agreement. In the alternative, she asked the court to vacate its order approving the Settlement Agreement, so that the litigation might continue. On May 20, 1983, the district court granted the motion for specific performance, holding that according to the clear and

[1] We omit parts of the history of the case not essential to the understanding of this appeal. For further details see *Airline Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir.) (per curiam), *cert. denied*, 439 U.S. 876 (1978). Though named in the caption, Air Line Stewards and Stewardesses Association, Local 550, is not a party in this appeal.

unambiguous terms of the agreement, "plaintiff and the returning class members are entitled to receive any and all of the benefits they would have received had they not been discharged by American." On May 31, 1983, American moved under Rule 59(e) of the Federal Rules of Civil Procedure for reconsideration of the May 20 order. The district court denied the motion.

American appeals from the May 20 order of specific performance and the subsequent denial of its Rule 59(e) motion. Our disposition of the appeal from the May 20 order renders the second matter moot, and we do not reach the issues raised in it.

II

The issue presented to us is whether the Settlement Agreement requires American to give retroactive retirement credit to class members who returned to work in accordance with its terms. The parties agree that the answer hinges on the meaning of the following provision in section V of the Settlement Agreement, entitled "Seniority and Credit for Length of Service":

> A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period [the period between termination and approval of the Settlement Agreement], except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise.

Thus we are presented with a question of contract interpretation. The interpretation of settlement agreements is governed by principles of state law applicable to contracts generally. *See Air Line Stewards and Stewardesses Assoc., Local 550 v. Trans World Airlines, Inc.*, 713 F.2d 319, 321 (7th Cir. 1983) (quoting *Florida Education Association,*

Inc. v. Atkinson, 481 F.2d 662, 663 (5th Cir. 1973)). The Settlement Agreement contains no choice of law clause; we thus follow the district court in looking to Illinois law for applicable principles of contract construction.

A. The Ambiguity of the Settlement Agreement

The primary object in construing a contract is to give effect to the intention of the parties. *Schek v. Chicago Transit Authority*, 42 Ill. 2d 362, 364, 247 N.E.2d 886, 888 (1969). The starting point is the Settlement Agreement itself; if the language of the Settlement Agreement clearly and unambiguously determines an answer to the question at issue, then the inquiry is over. *See J.R. Watkins Co. v. Salyers*, 384 Ill. 369, 373, 51 N.E.2d 574, 576 (1943). Whether a contract is ambiguous is a conclusion of law, reviewed de novo. *National Tea Co. v. American National Bank & Trust Co.*, 100 Ill. App. 3d 1046, 1049, 427 N.E.2d 806, 808 (1981). If the trial court holds that the contract is unambiguous, it must then go on to declare the meaning, and its declaration is likewise a conclusion of law, reviewed de novo. *See Hagerty, Lockenvitz, Ginzkey & Associates v. Ginzkey*, 85 Ill. App. 3d 640, 641, 406 N.E.2d 1145, 1146 (1980). But if the trial court holds that the contract is ambiguous, the meaning becomes a question of fact to be submitted to the trier of fact. *Id.* at 642, 406 N.E.2d at 1146. The trier of fact considers not only the language of the contract but also any extrinsic or parol evidence presented by the parties. *See Fox v. Inter-State Assurance Co.*, 84 Ill. App. 3d 512, 515, 405 N.E.2d 873, 876 (1980). Its determination is a finding of fact and is reviewed as such.

In this case the district court held that the Settlement Agreement unambiguously provides retroactive retirement credit to returning class members; under the principles just outlined, our review of this conclusion is de novo. Reading section V A in the context of the entire agreement, as we must, *Martindell v. Lake Shore National Bank*, 15 Ill. 2d 272, 283, 154 N.E.2d 683, 689 (1958), we find that we are unable to determine solely from the

language of the Settlement Agreement whether section V A is intended to grant such credits. It does not expressly mention retroactive retirement credit at all. Credit for company seniority and length of service may include retroactive retirement credit by implication, but we cannot ascertain this from section V A or any other provision of the Settlement Agreement.[2] Indeed, while it is clear that the parties intended the express grant of company seniority and credit for length of service to have beneficial consequences for the re-employed class members, we cannot determine from the face of the agreement what any of those beneficial consequences might be. The terms "company seniority" and "length of service" are not defined in the Settlement Agreement, either expressly or by reference to another document. No documents are incorporated by reference into the Settlement Agreement. No clause in the Settlement Agreement identifies or defines the specific benefits that are to flow from the grant of company seniority and credit for length of service. The language of section V A is compatible with an intention to grant retroactive retirement credit and also compatible with an intention not to grant it. Neither intention is so clearly favored by the language that we can say as a matter of law that one and not the other is embodied in the Settlement Agreement.[3]

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[2] Section III of the Settlement Agreement outlines the structure of the entire settlement; later sections fill in details. Section III C says: "All re-employed class members shall have, be credited with and enjoy the amount of Seniority and Credit for Length of Service as provided in Section V hereof." This provision, which refers to section V for details, sheds no additional light on the meaning of section V with respect to the question at issue.

[3] Burmeister argues earnestly that we can determine from the clear and unambiguous language of the Settlement Agreement itself, without reference to any extrinsic evidence, that credit for length of service means Credited Service, a defined term of

(Footnote continued on following page)

We therefore hold that the district court erred in concluding as a matter of law that the Settlement Agreement unambiguously awards retroactive retirement credit to returning class members. The Settlement Agreement is ambiguous, and its meaning is a question of fact. Consequently extrinsic evidence may, and indeed must, be considered in determining its meaning.[4]

If we were to follow the general rule, we would end our opinion at this point and remand the case for findings of fact. There are, however, strong reasons for not following the general rule in this case. The parties have thoroughly briefed the issue before us and have submitted to us all the extrinsic evidence that they have. The evidence is entirely documentary; no determinations of the credibility of witnesses are required. We are in as good a position to evaluate this evidence as the district court. Our own survey of the evidence persuades us that it

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[3] *continued*

American's Retirement Benefit Plan. *See infra* pt. II B (iii). But without consulting the Retirement Benefit Plan we have no way of knowing that the term "Credited Service" occurs in it, or what the term means, or whether a grant of retroactive Credited Service would amount to a grant of retroactive retirement credit. Burmeister's own argument thus requires us to consider some extrinsic evidence.

[4] The Settlement Agreement contains an exclusivity clause as section XII, which reads as follows:

> Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this agreement.

To use extrinsic evidence to determine what rights and obligations arise under the Settlement Agreement is not to use it "to modify, change or diminish" those rights and obligations. Thus the exclusivity clause does not bar the use of extrinsic evidence for the purpose of inferring what the parties have agreed to.

compels one conclusion and that a contrary conclusion would be clearly erroneous. To remand the case would require yet a third round of argument in the district court, doubtless to be followed by a fourth round on appeal. When we know the inevitable outcome, it would be a waste of judicial resources and an undue burden on the parties for us to order a remand. Accordingly, we shall depart from the general rule and forgo a remand.[5]

B. The Extrinsic Documentary Evidence

Because the Settlement Agreement does not define "company seniority" and "length of service," it is highly likely that the parties intended for these terms to have the significance that they have in some other document or documents governing the relationships among American, the flight attendants, and their union, and that the parties viewed the reference of the two terms to these other documents as too obvious to require explicit mention.[6] Since we must interpret the Settlement Agreement in accordance with the intentions of the parties, and since we have determined that the Settlement Agreement is ambiguous, permitting us to consider extrinsic evidence, we shall adopt the following procedure: we shall examine the three principal documents that govern the relationships among American, the flight attendants, and their union—American's regulations, the collective bargaining agreement, and the retirement plan—as they were in effect on the date of the Settlement Agreement, in order to determine if the terms "company seniority" and

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[5] In *Anderson v. City of Bessemer City*, ____ U.S. ____, 105 S. Ct. 1504 (1985), the Supreme Court cautions courts of appeals against reviewing a lower court's findings of fact de novo, even when those findings are based on documentary evidence. This admonition does not apply to the present case, because the district court made no findings of fact.

[6] Needless to say, we deprecate this approach to the drafting of contracts. If the parties had troubled to state what is meant by "company seniority" and "length of service" or to incorporate definitions by reference to other documents, this case probably would not have arisen.

"length of service" can be traced to any of them, so as to permit plausible inferences as to the beneficial consequences for flight attendants that the parties intended to flow from section V A.[7] In the light of our results we shall then consider the merit of the proposition that section V A grants retroactive retirement credit to reemployed class members.

(i) American's Regulations

In section 120-8 of the Regulations of American Airlines[8] we find three types of seniority defined: Company, Occupational, and Classification.[9] Company Seniority is "accredited service with the Company in any job classification." The "Company Seniority Date" is the date of employment by American or by a subsidiary or predecessor company, subject to adjustment for periods of inactive status. The Company Seniority Date determines the length of "accredited service" with American and is the basis for determining an employee's eligibility for length of vacation, vacation termination pay, leaves of

[7] The record contains a complete copy only of the Retirement Plan; our examination of the Regulations and collective bargaining agreement is confined to the parts in the record. In principle, we could consider other forms of extrinsic evidence as well, but we have found nothing useful in the record.

[8] The copy of this regulation contained in the record bears a date of 1982, and we are not certain that the same regulation has been in effect without amendment since 1977. Neither party has objected to the inclusion of a 1982 regulation in the record, although certain difficulties do arise. *See infra* p. 20.

[9] "Occupational Seniority" is accredited service in any particular "family" or "title group" under a labor agreement and applies only to employees covered by labor agreements. The term "seniority" as used in labor agreements with American, means "Occupational Seniority," unless the agreement specifies otherwise. "Classification Seniority" is accredited service in a particular job classification under a labor agreement or in Agent or Clerical/Other job classification under the Non-Management Salaried Pay Plan.

absence, initial sick leave, jury duty pay, travel, length of service awards, retirement benefits,[10] and long-term disability insurance. "Accredited service," we take it, is the period of time from the Company Seniority Date (adjusted for discontinuities of service) to the date of termination or to the present. "Company Seniority" appears to be nothing more than accredited service. The term "length of service" does not appear in the regulation, and we see no basis for inferring that "length of service" (as used in the Settlement Agreement) means accredited service.

(ii) **The Collective Bargaining Agreement**

The collective bargaining agreement between American and its flight attendants in effect in 1977 (the "CBA") defines "Service" as "the period of time assigned to active duty as a flight attendant with the Company unless otherwise specified." CBA art. 2(d). In Article 3, on compensation, we read: "For each full month of service, a flight attendant shall receive a base pay amount in accordance with his or her length of service as a flight attendant as follows: [table omitted]." The term "length of service" is not defined, but perhaps it need not be. If "service" is used as defined, then "length of service" would appear to mean, *ex vi termini*, the sum of all periods of service. Length of service also figures in the determination of incentive pay, apparently for overtime work, for which a separate table is provided.

In Article 9, entitled "Seniority General," we read: "Seniority as a flight attendant shall be based on the length of service as a flight attendant . . . ." Under the Regulations, *see supra* note 9 and accompanying text, this means Occupational Seniority, not Company Seniority.

Article 14, entitled "Transfer to Non-Flying or Supervisory Duties," provides that a flight attendant transferred to supervisory or other non-flying duties "shall

[10] On the inclusion of retirement benefits in this list, see *infra* p. 20.

retain and continue to accrue seniority and length of service credit for pay purposes for a period of one (1) year . . . ."

The generalization that we draw from these provisions is that length of service as a flight attendant determines a flight attendant's pay and Occupational Seniority.

(iii) **The Retirement Plan**

American's Retirement Benefit Plan for Flight Attendants, amended and restated as of January 1, 1976, (the "Retirement Plan"), was in effect in 1977. Under the plan, membership is voluntary; to be eligible, a flight attendant must be twenty-five years old and have completed a year of service. Members are required to make regular contributions to the plan,[11] and American is required to contribute the amounts necessary to fund the plan's obligations on a sound basis.

Roughly speaking, members are credited with one year of "Vesting Service" for each year they are credited with at least 386 Hours of Service, *see infra* note 12, after reaching age twenty-two. Members terminated with ten or more years of Vesting Service are entitled to a benefit on retirement; those with less than ten years of Vesting Service on termination of employment receive their own contributions back with interest.

Again speaking roughly, members are credited with one year of "Credited Service" for each year in which they are credited with at least 734 Hours of Service, *see infra* note 12, while both an employee and a member of the plan. Credited Service is a crucial factor in the determination of

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[11] In 1981 American agreed to an amendment of its collective bargaining agreement that changed the Retirement Plan to eliminate past and future contributions by the flight attendants. The amendment provided that previous employee contributions would be refunded to employees at work on September 1, 1981.

the amount of the retirement benefit to which a member is entitled.

Although fifty terms are expressly defined in the definitions article of the plan, neither "company seniority" nor "length of service" is among them. We have not been cited to, nor have we ourselves been able to find, any occurrences of these terms in the entire plan. We do find the expression "aggregate years of service." The definition is somewhat intricate and is set out in the margin.[12] The only significance of the aggregate years of service that we can find lies in the determination of the date of eligibility for readmission to the plan following a break in service.[13] Art. III, § 3.6.

C. "Length of Service" in Section V A

Our examination of the Settlement Agreement, American's Regulations, the CBA, and the Retirement Plan suggests some possible conclusions: (1) that the term "company seniority" as it appears in section V A of the Settlement Agreement means Company Seniority as defined in the Regulations, (2) that the term "length of service" as used in section V A means length of service as used in the CBA, and (3) that section V A's credit for length of service does not implicate the Retirement Plan

[12] An "Hour of Service" is any hour for which the employee is paid, whether for work performed or for vacation, holiday, etc. Art. II(z) (paraphrased). A "year of service" is any calendar year during which the employee is credited with 386 Hours of Service. The "aggregate years of service" are the number of years of service. Art. III, § 3.2 (paraphrased).

[13] If the break in service equals or exceeds the individual's aggregate years of service, then the prior service is disregarded and the individual is treated as a new employee. Otherwise, the individual becomes a member on the date on which he or she is first credited with an Hour of Service, *see supra* note 12, after termination, unless the date on which he or she would become a member without regard for this provision is later. Art. III, § 3.2 (paraphrased).

or provide retroactive retirement credit. But this is too hasty; a full reading of section V persuades us that (2), at least, is erroneous.

Section V comprises two subsections, A and B, more or less parallel. Subsection B grants to re-employed class members "full occupational (union) seniority and credit for length of service to the same extent as provided in Section V A . . . ," provided the union concurs in writing. If the union does not concur in writing, then "the amount of seniority and credit for length of service will be determined by the Court . . . ."[14] Occupational seniority is the second kind of seniority defined in the Regulations. *See supra* note 9. It determines priority of bidding for days off and flights and priority of layoffs and recalls. Section V is divided into two subsections apparently in order to provide the union with a veto over restoration of full occupational seniority and the corresponding length of service.[15] Occupational seniority is treated in the CBA and is apparently a subject of collective bargaining,

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[14] At the time the Settlement Agreement was approved, the Association of Professional Flight Attendants (APFA) had replaced the Air Line Stewards and Stewardesses Association as the exclusive bargaining representative for American's flight attendants. Section V B refers to APFA. Far from concurring in writing, APFA intervened in the proceeding below while the court was considering the Settlement Agreement, for the purpose of objecting to the Settlement Agreement's grant of retroactive occupational seniority to re-employed class members. APFA argued that such a measure would be an onerous burden on incumbent employees. The district court nevertheless approved the Settlement Agreement and in its order of October 4, 1977, expressly ordered that re-employed class members be restored to full occupational (union) seniority and credit for length of service as provided. The union appealed the order, and we affirmed. *Airline Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir.) (per curiam), *cert. denied*, 439 U.S. 876 (1978).

[15] This veto could be, and was, overridden by the court. *See supra* note 14.

whereas company seniority is apparently not. The length of service on which pay depends under the CBA is clearly length of service *as a flight attendant*, i.e., length of service in that occupation, rather than length of service with the company. CBA art. 2(d), 3(a). Since "length of service" in section V B occurs in tandem with "occupational (union) seniority," we think it likely that it means length of service in the occupation of flight attendant. In that case, a re-employed class member's pay will be determined by the length of service accorded to her under section V B, and not section V A. If "length of service" in section V B means length of service as a flight attendant, then "length of service" in section V A doubtless means length of service with the company. We think it is clear that they cannot mean the same thing, because the union is given a veto power over the Settlement Agreement's award of the one but not of the other. The length of service referred to in section V A appears to be beyond the reach of collective bargaining, just as company seniority is. But we are puzzled as to its significance.

One possibility, suggested by American, is that "length of service" in section V A means "accredited service" as defined in the Regulations. But this is highly implausible, because company seniority is nothing but accredited service with the company. On that reading, the phrase "company seniority and length of service" would be a pleonasm, like "triangle with three sides." Certainly the parties intended credit for "length of service" under section V A to be something in addition to credit for company seniority, and they intended for that credit to have beneficial consequences of some sort for the re-employed class members. But we have been unable to discover any independent significance for length of service with the company, as opposed to length of service as a flight attendant or company seniority. It appears to be an idle wheel.

D. Burmeister's Position

Burmeister contends that the credit for "length of service" in section V A is (or includes) a grant of retroactive retirement credit. In the absence of any straightforward explanation of the significance of the credit for length of service in section V A, this contention has some facial plausibility. At the least, it gives a function to an otherwise functionless term. Bringing retirement credits within the scope of section V A is not wholly arbitrary either; according to the Regulations, company seniority determines an employee's eligibility for retirement benefits.[16] Since the Retirement Plan is outside the scope of the CBA, if the Settlement Agreement was intended to give retroactive retirement credit, the grant would most likely have occurred in section V A.

In support of her position Burmeister argues that the close similarity between the terms "Credited Service" in the Retirement Plan and "credit for length of service" in section V A shows that section V A is intended to give re-employed class members retroactive Credited Service. She maintains further that this is the clear and unambiguous intent of section V A, when its terms are accorded their ordinary and natural meaning. She points out that the Notice to Class Members, on which the parties agreed, stated that each re-employed class member will be restored to full seniority and credit for length of service, which will apply *for all purposes*, and that American has in fact used the retroactive credit for seniority and length of service for the purpose of computing all employee benefits tied to seniority and length of service—with the sole exception of benefits under the Retirement Plan. Finally, she argues that she, as the named plaintiff, understood when she signed the Settlement Agreement that it included retroactive retirement benefits, and that she would not have signed it if she had believed that no such benefits had been included.

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[16] On this point, the Regulations do not appear to agree with the Retirement Plan. *See infra* p. 20.

E. Analysis

After considering all the arguments of the parties, we think that Burmeister's case is weak and that the reasons for not finding in section V A a grant of retroactive retirement credit are overpowering. Burmeister exaggerates the similarity of "Credited Service" and "credit for length of service." "Credited Service" is a defined term of the Retirement Plan that conspicuously does not appear in section V A. If "length of service" is given its ordinary and natural meaning, it certainly would not mean "Credited Service" under the Retirement Plan but simply the length of time the employee has been with the company.

Furthermore, if the parties had intended to allow for retroactive retirement credit, it is unlikely that they would have done so by a simple blanket extension of Credited Service to all re-employed class members for the entire compensation period. Participation in the Retirement Plan was voluntary, and according to the only evidence on the point that we find in the record, only one or two of the 120 re-employed class members had joined the Retirement Plan before termination.[11] Participation required more than an election to participate; members had to make regular contributions. In view of this it could hardly have been known to the negotiators of the Settlement Agreement that all the re-employed class members would want to participate or would have been able to make the required retroactive contributions.

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[11] The affidavit of Eva Chang, American's Manager of Pension Plan Administration, states on information and belief that "only one or two of the 120 returning class members had joined the Retirement Benefit Plan at the time of their initial employment with American Airlines." We interpret "at the time of their initial employment" to mean "before they were terminated for pregnancy." It cannot reasonably be taken to mean "at the time they were first hired," because participation in the Retirement Plan requires a year of service. While Burmeister draws our attention to the fact that Chang's statement was made on information and belief, she submitted no evidence to contradict or correct it.

If the parties had intended to accord retroactive retirement credits to re-employed class members, we think it highly likely that they would have mentioned the Retirement Plan or at least used distinctive terms like "retirement credit" or "Credited Service," and that they would have provided all re-employed class members the option of joining the plan or not, provided for the effective date of joining, and provided for the payment of back contributions so as to bring each member's account up to date. In view of the complexity and precision of the Retirement Plan, the value of rights under it, and the potential for continued confusion and controversy over details, we think it most unlikely that the parties, in providing for retroactive retirement credit, would have contented themselves with an oblique and uncertain reference to credit for "length of service," letting all the rest go. The language of section V A more readily supports the conclusion that the parties did not intend to include retroactive retirement credit in the Settlement Agreement.

The language in the Notice to Class Members[18] cannot be given controlling weight over the Settlement Agreement itself, and in any event it lends no support to Burmeister's position. The notice actually says only that "the seniority thus computed will apply for all purposes," for some reason leaving out length of service, but even if it is interpreted to mean that the length of service thus computed will also apply for all purposes, this can only mean for all purposes for which length of service is used.

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[18] The relevant part of the Notice to Class Members reads:

> Each re-employed Class Member will be restored to full seniority and credit for length of service, including such seniority and credit for the time since her employment was terminated, but without credit for time during which she was pregnant or otherwise disabled to work. The seniority thus computed will apply for all purposes, including choice of home base and pay.

But bare length of service is not used to compute any variable of significance in the Retirement Plan.[19]

The fact that American has used the re-employed class members' retroactive credit for seniority and length of service for the purpose of computing all employee benefits tied to seniority and length of service except for retirement benefits gives no support to Burmeister's position. The accrual of retirement benefits is not tied to seniority or to mere length of service, but to Vesting Service and Credited Service after one has joined the plan. Furthermore, we think it significant that the benefits that have been provided to re-employed class members in consequence of their retroactive seniority are all current benefits. For example, re-employed class members have not received credit for the paid vacation they would have earned if they had not been terminated; they have received only credit for the paid vacation they have earned after re-employment, based on their retroactively adjusted seniority. If the Settlement Agreement granted

[19] Since eligibility for membership in the Retirement Plan requires completion of a "year of service," it might be argued that the credit for "length of service" in section V A applies at least to this eligibility requirement. But that is by no means clear. The "year of service" required for eligibility is defined within the Retirement Plan in terms of "Hours of Service," also a defined term. *See supra* note 12. Hours of Service do not accumulate as "length of service" under the plan, but as "aggregate years of service." *See id.* If section V A had spoken of credit for "aggregate years of service," instead of "length of service," the implicit reference to the Retirement Plan would be reasonably clear. But "length of service" is a term foreign to the Retirement Plan, and we cannot say, without begging the question, that the parties intended that the re-employed class members should receive credit for "aggregate years of service" equal to the entire compensation period, a result that would apparently be compelled by the suggested reading of "length of service." Intuitively, a person might serve a year with the company, and thus have one year's "length of service," without fulfilling the number of Hours of Service requisite for a "year of service" under the Retirement Plan.

retroactive retirement credit to re-employed class members, American would be obligated to fund the retirement benefits actuarially attributable to those credits—an expenditure that American estimates at $850,000, or $86,500 a year for thirty years, almost a third of American's express monetary obligation under the Settlement Agreement.[20] Such an expenditure would be a retroactive benefit—American would have to pay what it would have paid if the re-employed class members had not been terminated and had all been members of the Retirement Plan. We think it unlikely that a uniquely retroactive benefit of such magnitude would have been buried so unobtrusively in the chosen language of section V A amidst other implied benefits that were wholly current, if the parties had really intended to create it.

In addition, we think that section III D of the Settlement Agreement was intended in part to prevent just such massive monetary obligations from being teased out of the language of the Settlement Agreement after it was signed and approved. In section III A, American agreed to pay $2,700,000 to the class, the only monetary obligation to the class members expressly set forth. Section III D reads as follows:

> American Airlines will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

No obligation to fund retroactive retirement benefits is expressly provided in the Settlement Agreement, and section III D bars implied monetary obligations. Indeed, section III D provides a strong reason in itself to think that the parties did not intend to include retroactive

[20] This is what it would have cost American in 1981, taking into account the 1981 amendment to the Retirement Plan. *See supra* note 11. The record does not show what it would have cost American in 1977, but the figure would clearly have been substantial, although less.

retirement credit in the settlement. The parties knew the content of section III D and so would have realized that if the Settlement Agreement was to grant retroactive retirement credits, American's obligation to fund those credits would have to be set forth expressly in the agreement.

In an affidavit attached to her memorandum in support of her motion for specific performance below, Burmeister said the following:

> 6. In 1977, one of the counsel for plaintiffs informed me that a tentative settlement agreement ("the 1977 Agreement") had been reached with American. I had previously explained that retroactive credited service under the Retirement Plan must be included in the 1977 Agreement in order for it to be acceptable to me. I signed the 1977 Agreement having been assured and led to believe that it included these benefits.

In the same affidavit she also says:

> 10. Had I believed at the time I signed the 1977 Agreement that it did not provide for retroactive credited service under the Retirement Plan, I would not have signed it on behalf of myself or as a class representative.

If Burmeister had made her understanding clear to *American* before signing the Settlement Agreement, and if *American* assured her and led her to believe that it included retroactive Credited Service, then American might very well be bound by her understanding. But Burmeister conspicuously does not say that she explained to *American* how she understood section V A, or that *American* assured her and led her to believe that her understanding was correct. If she could have truthfully made such assertions, we presume that she would have. Any particular interpretation that only one of the parties may have envisioned at the time the contract was executed is immaterial. *Smith v. Vernon*, 6 Ill. App. 3d 434, 436, 286 N.E.2d 99, 101 (1972).

Finally, we consider the effect of section 120-8 of American's Regulations, dated November 24, 1982, which states:

> The Company Seniority Date determines the length of "accredited service" with the Company. It is the basis for determining an employee's eligibility for:
>
> . . . .
>
> Retirement Benefits (REG 160-1).

Since this section bears a date of 1982, the quoted passage may have been revised to reflect the 1981 changes to the Retirement Plan. *See supra* note 11. Thus we hesitate to treat it as straightforwardly applicable in 1977. It is insignificant that the passage speaks of "Company Seniority Date" rather than "Company Seniority"; length of accredited service *is* Company Seniority, and, as the passage says, length of accredited service is determined by Company Seniority Date. "Company Seniority" and "Company Seniority Date," though differently defined, appear to us to be functionally interchangeable. The passage refers us to another regulation, REG 160-1, which evidently contains more information. But the parties have not supplied us with REG 160-1, and we do not know what it says. The statement that Company Seniority Date is the basis for determining an employee's eligibility for retirement benefits conflicts with the clear provisions of the Retirement Plan as in effect in 1977, and we doubt that it is true. Article VI of the Retirement Plan, entitled "Eligibility for Benefits," does not make use of the terms "Company Seniority Date" or "Company Seniority," nor does it in any other way indicate that Company Seniority, as defined in the Regulations, plays any part in the determination of an employee's eligibility for benefits. Because of this discrepancy and the uncertain effectiveness of the quoted passage in 1977, we do not find the passage to be trustworthy evidence supporting Burmeister's position.

All of these considerations lead us to conclude, and we hold, that the Settlement Agreement does not provide

retroactive retirement credit to re-employed class members.

III

In her motion to the district court seeking specific performance of the Settlement Agreement, Burmeister moved in the alternative to vacate the order of October 4, 1977, approving the Settlement Agreement and dismissing the action, "to allow plaintiff to adjudicate fully her cause of action against defendant." Because the district court granted the motion for specific performance, it did not rule on the alternative motion. Thus it may appear that we must remand the case for such a ruling. After reviewing her motion and supporting memorandum, we have come to the conclusion that such a remand is unnecessary.

Burmeister's reason for seeking the vacation of the order is that the Notice to Class Members, *supra* note 18, misled them into believing that they would receive full retroactive credited service under the Retirement Plan. We assume without holding that inadequate notice of a proposed settlement in a class action may be sufficient grounds for vacating the order approving the settlement. *See Simer v. Rios*, 661 F.2d 655, 664 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982). But Burmeister submitted no evidence that the notice misled any class member into believing that the Settlement Agreement provided retroactive retirement credit to those re-employed, and no evidence that any class member (besides herself) would have objected to the settlement if the notice had stated explicitly that retroactive retirement credit was not included.[21]

[21] Burmeister's affidavit of March 18, 1983, states that after she was told in 1979 that she would not receive retroactive retirement credit, she contacted a re-employed class member, Peggy Allen, who engaged counsel to pursue the matter administratively. But the record contains no affidavit from Allen asserting that she was misled by the notice.

The language in the notice that Burmeister finds especially misleading is the statement: "The seniority thus computed will apply for all purposes . . . ." As we noted *supra*, the subject of this statement is *seniority*, which, at least in 1977, had nothing to do with the Retirement Plan. It is not seniority but *credit for length of service* that Burmeister consistently portrays as suggesting retroactive retirement credit, yet the statement says nothing about credit for length of service, even though the preceding sentence does.[23]

Furthermore, it appears that the vast majority of reemployed class members were not members of the Retirement Plan when they were terminated.[24] In order to believe on the basis of the notice that they were to receive retroactive retirement credits, such persons would have to infer that the Settlement Agreement retroactively inducted them into the Retirement Plan. It is clear to us that such an inference could not reasonably be based on the language of the notice, without further inquiry.

For these reasons, we hold that the notice to class members was not so misleading as to require the vacation of the order approving the settlement and dismissing the action.[25]

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[23] We noted this anomaly *supra*, p. 16. A prudent class member might have inquired whether the omission of "credit for length of service" was deliberate, and if so, what it meant, but as far as we know, no one did.

[24] *See supra* note 17.

[25] Ordinarily we would not decide a motion addressed to but not acted on by the district court. In this case, however, we have before us all the briefs and evidence presented to the district court, and since we are in as good a position as the district court to decide the motion, we depart from our usual practice in the interest of judicial economy and put the question of retroactive retirement credits under the Settlement Agreement finally to rest.

IV

The judgment of the district court is reversed, and the case is remanded with directions to deny the plaintiff's motion for specific performance of the Settlement Agreement and her motion to vacate the order approving the Settlement Agreement.

SO ORDERED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—6-7-85—450

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

70 C 2069

MEMORANDUM OPINION AND ORDER

(Entered May 20, 1983)

On August 3, 1977, a settlement agreement was entered into between plaintiff and class representative Darlene Preston (now "Darlene Burmeister") and defendant American Airlines ("American"). Plaintiff contends that American has not fulfilled its obligations under the terms of the agreement because American has refused to allow plaintiff and the other class members who were re-employed under the terms of the settlement agreement ("returning class members") to fully participate in its Retirement Benefit Plan ("Plan"). Specifically, plaintiff avers that the returning class members should be allowed, in accordance with the provisions of the settlement agreement, to participate in the Plan on a retroactive basis, encompassing both the period of employment each returning class member worked for American prior to her termination, and the compensation period.[1]

The sequence of events which led to the parties' decisions to enter into the settlement agreement is briefly as follows. In 1970, the Air Line Stewards and Stewardesses Association, Local 550 ("ALSSA"), filed a complaint against American. In its complaint, ALSSA alleged that American had violated Title VII, 42 U.S.C. § 2000e-2, by terminating stewardesses who became pregnant and had children. In 1972, plaintiff filed a

[1] "Compensation period" is defined in the settlement agreement as "the period of time which commenced upon the termination of a class member's employment and ends on the date on which an order is entered approving this settlement." Settlement Agreement at 2.

class action on behalf of the stewardesses who became pregnant, had children, and were terminated by American. Once again, the cause of action was that American had violated Title VII. In 1974, the class was certified[2] and plaintiff became the class representative. Finally, in 1974, plaintiff filed a class action against ALSSA contending that it had actively participated in American's discrimination and had thereby violated Title VII. These three cases were eventually consolidated and on April 28, 1976, summary judgment was entered against American.

Pending American's appeal of that decision, the parties entered into the 1977 settlement agreement. The agreement, in essence, provides that: (1) a pro rata share of the remainder of $2,700,000, after court awards for litigation expenses, costs and attorneys' fees are deducted, will be paid to each certified class member; (2) American will re-employ all members of the certified class who apply and meet various requirements; and (3) all returning class members will receive the amount of company seniority and credit for length of service that should have been received had their employment not been terminated by American. In 1977, the settlement agreement was approved by court order and the consolidated case was dismissed.

Plaintiff has filed a motion asking the court to order specific performance of the settlement agreement, which would allow plaintiff and the returning class members to fully participate in the Retirement Benefit Plan or, in the alternative, to vacate the order dismissing the case. For the following reasons, plaintiff's motion seeking specific performance is granted.

The construction of a settlement agreement is to be governed in accordance with the principles of law which govern a contract. *Okonko* v. *Union Oil Co. of California,* 519 F. Supp. 372 (C. D. Cal. 1981); *see also United States* v. *Orr Construc-*

[2] The certified class was composed of stewardesses whose employment had been terminated between 1965 and 1970 because they had become pregnant and had children.

tion Co., 560 F. 2d 765 (7th Cir. 1977). The interpretation, construction, or legal effect of a contract are issues to be resolved by the court as questions of law. *Mazanek* v. *Rockford Drop Forge Co.*, 98 Ill. App. 3d 956, 424 N. E. 2d 1271 (1981). Further, when the terms of a contract are clear and unambiguous, no parol or extrinsic evidence can be considered to change the meaning of the terms. *Susmano* v. *Associated Internists of Chicago, Ltd.*, 97 Ill. App. 3d 215, 422 N. E. 2d 879 (1981). To determine whether ambiguity exists in the language of a contract, the instrument must be considered as a whole. Courts cannot consider some clauses and ignore other clauses. *Valerio* v. *R & R Construction Co.*, 20 Ill. App. 3d 48, 312 N. E. 2d 713 (1974).

In applying these rules to the 1977 settlement agreement, it is evident that the terms of the agreement are clear and unambiguous. The language is not "reasonably susceptible to more than one meaning." *Susmano*, at 219, 422 N. E. 2d at 882. According to the clear terms of the agreement, plaintiff and the returning class members are entitled to receive any and all of the benefits they would have received had they not been discharged by American.

Paragraph V of the settlement agreement is entitled "Seniority and Credit for Length of Service." The first sentence of this paragraph explicitly provides that "[e]ach re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period. . . ."

The Retirement Benefit Plan is one of the benefits American employees enjoy. In addition, the retirement benefits of the Plan are determined by the number of years an employee has worked for American. Clearly, the phrase "credited with . . . company seniority and length of service to which she was

entitled" means that plaintiff and the returning class members are entitled to the benefits of the Plan consistent with their credit for length of service.

At one time, in order to be eligible to receive the benefits of the Plan, employees were required to make yearly contributions to the Plan. If an employee's contribution were still a requirement, American would have to allow plaintiff and other returning class members the opportunity to make retroactive contributions to the Plan and thus participate in the Plan's benefits.

However, since 1980, a new version of the Plan has been in effect. This new Plan does not require employee contributions in order for an employee to be eligible to receive its benefits. In addition, in 1981, American agreed[3] to pay back to its employees all of the contributions previously paid into the Plan. As a result of these facts, plaintiff and the returning class members are no longer required to make contributions to the Plan in order to receive benefits based on credit for length of service.

Finally, the mandate found within paragraph VI of the settlement agreement that "American . . . will not discriminate in any way against any class member by virtue of the fact that she is a class member or adopt or enforce any employment practice, condition or qualification which operates to discriminate against any class member" buttresses the clear meaning of the terms of the agreement. In order to avoid discrimination, plaintiff and the returning class members must be awarded all of the benefits they would have received had they not been discharged. Clearly, the Plan is a part of those benefits.

In conclusion, plaintiff's motion for specific performance is granted. According to the terms of the settlement agreement, plaintiff and the returning class members who desire to partici-

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[3] The agreement was between the Association of Professional Flight Attendants and American. Plaintiff and the returning class members are members of the Association.

pate in the Plan must be credited with their length of service during the compensation period and their time of employment with American prior to the compensation period, for purposes of qualifying, vesting and calculating benefits under the Plan. In addition, American must inform plaintiff and the returning class members of their rights to participate retroactively in the Plan.

ENTER:

/s/ Frank J. McGarr
UNITED STATES
DISTRICT JUDGE

DATED: May 20, 1983

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 15, 1985.

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,

Plaintiffs-Appellees,

No. 84-1073 vs.

AMERICAN AIRLINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 C 2069

Frank J. McGarr, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause by plaintiffs-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

CERTIFICATE OF SERVICE

I, Michael B. Roche, being first duly sworn upon oath, depose and state as follows:

1. I am a member of the Bar of this Court in good standing.

2. I caused to be deposited in the United States mailbox at 3100 Prudential Plaza, Chicago, Illinois, 60601, with first class postage prepaid, a sufficient number of copies of the "Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" in the lawsuit styled Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, et al. v. American Airlines, Inc. This mailing occurred on Tuesday, November 12, 1985 at approximately 5:00 p.m. within the permitted time under 28 U.S.C. §2101(c).

3. At the same time and place, with first class postage prepaid, I caused to be served by mail three copies of said Petition on Gordon B. Nash, Jr., Esq., Counsel of Record for Respondent, American Airlines, Inc., at Gardner, Carton & Douglas, One First National Plaza, Chicago, Illinois, 60603.

Michael B. Roche

Subscribed and sworn to
before me this 12th day
of November, 1985.

Notary Public